Supreme Court
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NO. 00-10666

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2001

WILLIAM JOSEPH HARRIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO THE BRIEF IN OPPOSITION

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ARGUMENT

A. Most circuit courts of appeals believe they are constrained by McMillan v. Pennsylvania from extending Apprendi v. New Jersey to statutory minimums.

As pointed out by Respondent, the courts of appeals, with the exception of the Sixth Circuit, believe they are constrained by McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986) from applying the Apprendi rationale to statutory minimums. (See Resp't. at 15-17.) However, the Sixth Circuit found that rationale was logically applicable to statutory minimums, holding that "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved." United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001). Although the Sixth Circuit has since narrowed that holding, it continues to apply the Apprendi rationale where a district court sentences at the bottom of the statutory sentencing range; thus, indicating that the court "thought itself constrained by a specific statute to impose the sentence it did." United States v. Garcia, 252 F.3d 838, 843 (6th Cir. 2001). Therefore, although the holding is narrowed, it is still in conflict with other circuits' belief that McMillan precludes all extensions of Apprendi to statutory minimums.

B. Apprendi should be extended to statutory minimums.

The Sixth Circuit is correct in its assessment that Apprendi should be extended to statutory minimums. This Court stated in Apprendi that other than the fact of a prior conviction, "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. at 490, 120 S. Ct. at 2362-63 (2000)(quoting from Jones v. United States, 526 U.S. 227, 252-53, 119 S. Ct. 1215, 1228-29, (1999) (Stevens, J., concurring)) (emphasis added); (also citing Jones, 526 U.S. at 253, 119 S. Ct. at 1229 (Scalia, J., concurring) ("it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.")) In addition, both Justice Stevens and Justice Thomas have stated that the principle espoused in Jones and Apprendi apply to facts that increase the minimum permissible sentence. See Jones, 526 U.S. at 253, 119 S. Ct. at 1229, 143 L. Ed. 2d 311 (Stevens, J., concurring) ("a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence. . . .") and Apprendi, 530 U.S. at 521, 120 S. Ct. at 2379 (Thomas, J., concurring) (this "common-law rule would cover the McMillan situation of a mandatory minimum sentence.")

C. The legislative history does not conclusively state that "brandishing" and "discharge" in §§ 924(c)(1)(A)(ii) and (iii) are sentencing factors.

Respondent asserts that the "legislative history of the 1998 revisions to § 924(c)(1)(A) indicates that Congress expected factors such as brandishing to be taken into account at sentencing,

rather than to figure into the threshold determination of criminal liability." (Resp't. at 11.) However, other sections of the legislative history indicate that Congress intended brandishing and discharging to be crimes, not mere sentencing factors. The House Report of the House of Representatives repeatedly uses the words "conviction" and "charge," words associated with crimes, not sentencing enhancements. The House of Representatives stated in the House Report "[t]o sustain a conviction for brandishing or discharging a firearm, the government must demonstrate that the firearm was used 'during and in relation to' the commission of the federal crime of violence or drug trafficking crime." H.R. 344, 105th Cong., 1st Sess. 12 (1997) (emphasis added). The Report further stated "H.R. 424 also defines the term 'brandish,' for purposes of a § 924(c) charge." Id. (emphasis added). Another reference to "brandishing" as a "charge" followed, stating, "unavailability of witnesses or disputes between witness recollections would not preclude prosecutors from bringing a charge for brandishing a firearm under § 924(c)." Id. at 13 (emphasis added).

The terms "conviction" and "charge" are not used when referencing sentencing matters or, for example, the United States Sentencing Guidelines. Rather, "charge" when used in reference to a criminal case is defined as "the specific crime the defendant is accused of committing. Accusation of a crime by a formal complaint, information or indictment." Black's Law Dictionary 233 (6th ed. 1990). "Conviction" is defined as "the result of a criminal

trial which ends in a judgment or sentence that the accused is guilty as charged." Id. at 333. The references to bringing a "charge" and sustaining a "conviction" clearly indicate that Congress expected defendants to be charged in an indictment with a crime under §§ 924(c)(1)(A)(ii) and (iii), a requirement not expected for a mere sentencing factor. Thus, while Petitioner recognizes that the legislative history contains some language indicating that Congress may have intended §§ 924(c)(1)(A)(ii) and (iii) to be sentencing factors, Petitioner asserts that the legislative history is not conclusive on that point because it also contains language indicating that Congress intended §§ 924(c)(1)(A)(ii) and (iii) to be separate crimes.

D. If Congress intended "brandishing" and "discharge" in §§ 924(c)(1)(A)(ii) and (iii) to be sentencing factors, then §§ 924(c)(1)(A)(ii) and (iii) are facially unconstitutional.

Respondent asserts that Congress intended "brandished" and "discharged" of § 924(c)(1)(A) to be mere sentencing factors. (Resp't. at 10 n.4.) Assuming *arguendo* that Respondent is correct, Petitioner asserts that § 924(c)(1)(A)(ii) is facially unconstitutional and violates both the Fifth Amendment right to due process and the Sixth Amendment right to a jury under the Jones and Apprendi rationales. In Apprendi, this Court stated that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. at 490, 120 S. Ct. at 2362-63

(quoting from Jones, 526 U.S. 252-53, 119 S. Ct. 1228-29, 143 L. Ed. 2d 311) (Stevens, J., concurring)) (emphasis added).

When applying this principle to § 924(c)(1)(A)(ii), a finding that the defendant "brandished" a firearm unquestionably increases the prescribed range of penalties because the defendant can no longer be sentenced to 5 or 6 years of imprisonment as was permissible under § 924(c)(1)(A)(i). The defendant must be sentenced to at least 7 years. Thus, the range of penalties is increased from 5 years to life to 7 years to life. As explained by Justice Thomas, "The mandatory minimum entitles the government to more than it would otherwise be entitled." Apprendi, 530 U.S. at 521-22, 120 S. Ct. at 2379. Therefore, if this Court finds that Congress intended for a judge to determine by a preponderance of the evidence whether the defendant "brandished" a firearm, then under the principle espoused in Jones and Apprendi, the statute cannot be saved from a constitutional attack. See United States v. Buckland, 259 F.3d 1157 (9th Cir. 2001) (21 U.S.C. §§ 841(b)(1)(A) & (B), having been previously found to be sentencing factors, are facially unconstitutional under Apprendi).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

Respectfully submitted, this the 17th day of October, 2001.

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WILLIAM JOSEPH HARRIS,

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CERTIFICATE OF SERVICE

I, William C. Ingram, certify that as counsel of record for Petitioner, I have served an original and ten (10) copies of the Reply to the Brief in Opposition in the above-entitled case by Federal Express Overnight delivery to:

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, NE
Washington, DC 20543

and by U. S. Mail to all others required to be served.

This, the 17th day of October, 2001.

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SENT VIA FED EX PRIORITY OVERNIGHT - TRACKING NO. 826168253732

Re: William Joseph Harris v. United States of America: No. 00-10666

Dear Mr. Suter:

Regarding the above-captioned case, please find enclosed the original and ten (10) copies of our Reply To The Brief In Opposition, as well as the Certificate of Service, served separately.

If you have any questions, please do not hesitate to contact me.

Sincerely,

William C. Ingram
First Assistant Federal Public Defender

WCI/lgc
Enclosures
cc: Theodore B. Olson, Esq.
William Joseph Harris

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